Supreme Court, U.S.
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No. 79-1609

In the Supreme Court of the United States

OCTOBER TERM, 1979

PATRICK W. HANIGAN AND THOMAS H. HANIGAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioners contend that the district court erred in refusing to dismiss the pending federal prosecution against them on double jeopardy grounds and that the court of appeals erred in holding that it lacked appellate jurisdiction over other pretrial rulings challenged by petitioners in the court of appeals before their trial.

1. Petitioners were indicted on October 10, 1979, in the United States District Court for the District of Arizona for violation of the Hobbs Act, 18 U.S.C. 1951. On November 13, 1979, petitioners moved to dismiss the indictment based on the grounds, among others, that they are being put in jeopardy a second time by virtue of a previous acquittal in a state prosecution based on the

same occurrence and that the Hobbs Act does not extend to the conduct described in the indictment. On December 14, 1979, the court rejected each claim and denied the motion to dismiss (Pet. App. A).

Before trial, petitioner attempted to appeal the denial of their motion. The court of appeals, however, summarily affirmed, holding (1) under the dual sovereignty doctrine, the federal prosecution does not place defendants in jeopardy a second time for the same offense, and (2) none of the other rulings of the district court are appealable before trial (Pet. App. B).

2. Petitioners' double jeopardy claim rests upon a prior state prosecution arising from the same facts upon which the current federal prosecution is based. It has long been the law that successive state and federal prosecutions in such cases do not violate the Double Jeopardy Clause. *Abbate* v. *United States*, 359 U.S. 187 (1959); *Bartkus* v. *Illinois*, 359 U.S. 121 (1959); accord, *United States* v. *Wheeler*, 435 U.S. 313, 316-317 (1978). The court of appeals was plainly correct in holding that the federal prosecution does not subject petitioners to double jeopardy.

3. Petitioners' claim that the Hobbs Act is inapplicable to this case is not appealable at this stage in the proceedings. *Abney* v. *United States*, 431 U.S. 651, 663 (1977), is precisely on point. *Abney* held that while a double jeopardy claim is appealable before trial, the sufficiency of the indictment in that case under the Hobbs Act is not appealable before trial.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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